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MEETING DOCUMENT

From:	Presidency
To:	Working Party on Dual-Use Goods
N° prev. doc.:	WK 912/2020 INIT
Subject:	Comments regarding the SIPRI report “Detecting, Investigating and Prosecuting Export Control Violations” dated December 2019

Regarding agenda item 2d) of the Dual-Use Working Party on 10 November 2020, delegations will find attached a paper on the SIPRI report "DETECTING, INVESTIGATING AND PROSECUTING EXPORT CONTROL VIOLATIONS" dated December 2019.

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Comments regarding the SIPRI report “DETECTING, INVESTIGATING AND PROSECUTING EXPORT CONTROL VIOLATIONS” dated December 2019 (presented in the DUWP on 22 January 2020, WK 912/2020 INIT)

Funded by the US Department of State’s Export Control and Related Border Security (EXBS) Program, the Stockholm International Peace Research Institute (SIPRI) produced in December 2019 a report “DETECTING, INVESTIGATING AND PROSECUTING EXPORT CONTROL VIOLATIONS - European Perspectives on Key Challenges and Good Practices” (<https://www.sipri.org/publications/2019/other-publications/detecting-investigating-and-prosecuting-export-control-violations-european-perspectives-key>), which has been presented by SIPRI in the framework of the DUWP on 22 January 2020 (WK 912/2020 INIT).

This SIPRI report analyzes differences between national systems in the EU (chapter 2), highlights the main obstacles that states face with regard to the detection, investigation and prosecution of export control violations and examines what steps have been taken — and could be taken — at the national and multilateral levels to overcome them (“challenges & good practices”, chapter 3) and lists examples from real cases (“case studies and lessons learned”, chapter 4). It concludes by providing seven recommendations for improvements at EU level (chapter 5). While the major focus of the report lies with enforcements aspects of export controls, it also highlights the important role of licensing authorities within the export control architecture.

Taking into account the central focus of the report as well as the particular importance of the respective enforcement authorities, a profound discussion of the challenges, good practices and recommendations described in the report needs to take place within the framework of the future Enforcement Coordination Mechanism (ECM). In order to facilitate a fruitful discussion, the Presidency hereby provides enclosed table, listing the seven recommendations as outlined by the report together with comments, to serve as food-for-thought for further considerations.

It is to be noted that, as the report is based on the current legal framework (Regulation (EC) No. 428/2009), certain aspects of the report relating to the licensing procedures have in the time since its publication already been reflected in the process of the recast.

	SIPRI recommendation	Comments
1.	Further enhance transparency of national penalties for export control violations and explore greater harmonization <i>Conduct a comprehensive comparison of member states’ penalties for export violations and consider how realistic it is to push for the harmonization of penalties given the complexities and differences in national legal structures.</i>	The establishment of offences and penalties is a national competence of EU MS. Article 24 of Regulation 428/2009 (i.e. Article 22 para 1 of the new Dual-Use Regulation) foresees that each Member State shall take appropriate measures to ensure proper enforcement of all the provisions of this Regulation. In particular, it shall lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation. Those penalties must be effective, proportionate and dissuasive.

		<p>A comparison table of national penalties has already been provided in Annex I to the OJ Notices from MS on national measures (2020/C 16/04).</p> <p>Subject to the national competence of EU MS, a discussion of potential harmonization of penalties between EU MS is possible.</p>
2.	<p>Create a forum for exchanging information on national enforcement measures</p> <p><i>Ensure that national enforcement expertise is properly represented in the proposed Enforcement Coordination Mechanism and make certain that the workings of this group are integrated into the activities of the DUCG.</i></p>	<p>Article 22 para 2 in the new Dual-Use Regulation already foresees an Enforcement Coordination Mechanism under the auspices of the DUCG in order to create a forum for exchanging information on national enforcement measures.</p> <p>Aim of the Enforcement Coordination Mechanism is to establish a forum for continuous and fruitful dialogue and cooperation between licensing authorities and enforcement agencies in order to bring together views and expertise from both sides.</p>
3.	<p>Improve reporting on national enforcement measures under the EU Dual-use Regulation</p> <p><i>Expand the requirement to report on national enforcement measures to include all cases involving the unlicensed trade in dual-use goods, rather than just violations of the Dual-use Regulation.</i></p>	<p>Generally, enforcement cases and related information exchange which are not connected to the Dual-Use Regulation cannot be regulated under the Dual-Use Regulation. Extent and limits of information exchange to be discussed in ECM.</p>
4.	<p>Improve reporting on national enforcement measures under the EU arms embargoes</p> <p><i>Review if and how the requirement to report on the enforcement of EU sanctions is being applied and connect this requirement to those in place under the Dual-use Regulation</i></p>	<p>Related to recommendation no. 3. Reporting on enforcement cases regarding other measures such as sanctions/arms embargoes would not be covered by DUWP mandate. Extent and limits of information exchange to be discussed in ECM.</p>
5.	<p>Build effective links between the various EU mechanisms for sharing information on national enforcement measures</p> <p><i>Consider how to create stronger links between the Enforcement Coordination Mechanism and other existing and proposed EU mechanisms to avoid duplication of effort and create synergies.</i></p>	<p>To be considered within the ECM – identification of generally possible coordination including CCWP, CONOP, COARM, RELEX, EUROPOL.</p>
6.	<p>Adopt clearer and more harmonized language on complex concepts</p> <p><i>Use the recast of the Dual-use Regulation to generate language that aims to bring clarity to the application of controls on software and technology while also creating mechanisms for drafting guidelines to address other areas related to controls on ITT, such as cloud computing.</i></p>	<p>Regarding SIPRI's examples on ITT and de-control notes, a clearer and more harmonized interpretation are currently being developed within the TEG DUR, generally including all relevant stakeholders.</p> <p>Also, guidance on Cloud Computing could be possible.</p>

	<p><i>Ensure that the process of drafting these definitions and guidelines is as open and inclusive as possible, and takes account of national legal judgments in relevant cases and the views of all the affected sectors and actors, including prosecutors.</i></p>	
7.	<p>Make detection, investigation and prosecution a key focus of internal capacity-building and outreach efforts</p> <p><i>Devote EU resources to building the capacity of officials in EU member states in areas related to the detection, investigation and prosecution of export control violations.</i></p> <p><i>Ensure that enforcement forms a core component of outreach activities and that there is sufficient funding for such efforts.</i></p>	<p>EU Inreach and Outreach activities to be reviewed to what extent they include enforcement issues and customs officials. Targeted prosecutor training is also possible.</p>